Hon. Jason Marks, District Court Judge
Fourth Judicial District, Dept. No. 4
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802
(406) 258-4774

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

PHOEBE CROSS, a minor by and through his guardians Molly Cross and Paul Cross; MOLLY CROSS, an individual; PAUL CROSS, an individual; JANE DOE, an individual; JOHN DOE, an individual; JUANITA HODAX, on behalf of herself and her patients; KATHERINE MISTRETTA, on behalf of herself and her patients, Plaintiffs, v. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; AUSTIN KNUDSEN, in his official capacity as Attorney General; MONTANA BOARD OF MEDICAL EXAMINERS; MONTANA BOARD OF NURSING; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLIE BRERETON, in his official capacity as Director of the Montana Department of Public Health and Human Services, Defendants.	Dept. No. 4 Cause No. DV-23-541 **ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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This matter comes before the Court on the parties' cross-motions for summary judgment. The Court has considered Plaintiffs' *Motion for Summary Judgment* (Doc. 185) and Appendix (Docs. 187, 188), Defendants' Brief in Response (Doc. 205) and all corresponding exhibits (Docs. 206–230), and Plaintiffs' Reply (Doc. 233). The Court has also considered Defendants' *Motion for Summary Judgment* (Doc. 189) with all attached exhibits and separately filed declarations (Docs. 191–197), Plaintiffs' Brief in Response and Supplemental Appendix (Doc. 204), and Defendants' Reply (Doc. 234). Also, the Court has considered Plaintiffs' Supplemental Brief in Support along with their second Supplemental Appendix (Doc. 259), Defendants' Supplemental Brief on Count VI (Doc. 260), and Defendants' Response Brief on Count VI along with the attached exhibit (Doc. 271).

In addition to reviewing the briefing on summary judgment and the record in its entirety, the Court heard oral argument on the parties' cross-motions for summary judgment on April 24, 2025. The Court is fully informed and prepared to rule.

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ORDERS

1. The Court hereby GRANTS Plaintiffs' *Motion for Summary Judgment* as to Counts I (Equal Protection of the Laws), III (Right to Privacy), and VI (Freedom of Speech and Expression). The Court hereby DENIES Defendants' *Motion for Summary Judgment* as to the same.

2. Having granted Plaintiffs' *Motion for Summary Judgment* on Counts I, III, and VI, the Court hereby PERMANENTLY ENJOINS Senate Bill 99. The Court concludes Counts II (Interference with Fundamental Parental Rights), IV (Right to Seek Health), and V (Right to Dignity) are moot.

3. The final pre-trial conference and the pending trial in this matter are hereby ORDERED VACATED.

FACTUAL AND PROCEDURAL BACKGROUND

Senate Bill 99

As part of the 68th Legislative Session, the Montana Legislature passed Senate Bill 99 ("SB 99"), titled the "Youth Health Protection Act." S. 99, 68th Leg., Reg. Sess. (Mont. 2023) (codified as Mont. Code Ann. §§ 50-4-1001 to 1006, 37-2-307, 53-6-136). SB 99's stated purpose is "to enhance the protection of minors and their families . . . from any form of pressure to receive harmful, experimental puberty blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority." Mont. Code Ann. § 50-4-1002.

SB 99 proscribes the use of certain treatments and surgical procedures for "a female minor to address the minor's perception that her gender or sex is not female." Mont. Code Ann. § 50-4-1004(1)(a). The surgical procedures that SB 99 prohibits for "female minors" include, but are not limited to, "a vaginectomy, hysterectomy, oophorectomy, [and] ovariectomy." Mont. Code Ann. § 50-4-1004(1)(a)(i). SB 99 also prohibits administering "supraphysiologic doses of testosterone or other androgens" and "puberty blockers such as GnRH agonists or other synthetic drugs" to "female minors." Mont. Code Ann. § 50-4-1004(1)(a)(ii)–(iii). Likewise, SB 99 prohibits different treatments and surgical procedures for "a male minor to address the minor's perception that his gender or sex is not male." Mont. Code Ann. § 50-4-1004(1)(b). For "male minor[s]," SB 99 prohibits surgical procedures including, but not limited to, "a penectomy, orchiectomy, vaginoplasty [and] clitoroplasty." Mont. Code Ann. § 50-4-1004(1)(b)(i). It also prohibits "supraphysiologic doses of estrogen" and "puberty blockers such as GnRH agonists" that "delay or suppress pubertal development in male minors." Mont. Code Ann. § 50-4-1004(1)(b)(ii)–(iii). Importantly, SB 99 exempts these treatments and surgeries from its prohibitions if not knowingly used to "address a female minor's perception that her gender or sex is not female," and similarly exempts them if not knowingly used to address "a male minor's perception that his gender or sex is not male." Mont. Code Ann. § 50-4-1004(1)(c).

SB 99 imposes professional consequences on health care providers who knowingly violate its provisions. Declaring that a physician or health care professional who provides a prohibited procedure or treatment has "engaged in unprofessional conduct and is subject to discipline." Mont. Code Ann. § 50-4-1004(2)(a). SB 99 mandates "the appropriate licensing entity or disciplinary review board" to suspend the person's "ability to administer health care or practice medicine for at least 1 year." Mont. Code Ann. § 50-4-1004(2)(a). The bill also grants the "parents or guardians of the minor subject to the violation . . . a private cause of action for damages and equitable relief." Mont. Code Ann. § 50-4-1004(2)(b). Additionally, SB 99 precludes a health care professional or physician's professional liability insurance from including coverage for damages assessed against the person for providing a prohibited procedure or treatment. Mont. Code Ann. § 50-4-1006.

SB 99 contains additional prohibitions. Public funds may not be directly or indirectly used to provide the prohibited procedures or treatments; an individual or entity who pays for a prohibited procedure or treatment may not deduct the amount paid from their state taxes; Montana Medicaid and children's health insurance programs may not reimburse or provide coverage for prohibited procedures or treatments; and State properties may "not be knowingly used to promote or advocate the use of social transitioning" or the prohibited procedures or treatments. Mont.

Code Ann. § 50-4-1004(3), (5), (6), (7). The attorney general may bring an action to enforce compliance. Mont. Code Ann. § 50-4-1004(11).

Terminology

The Court addressed the following terminology in its Order Granting Plaintiffs' Motion for Preliminary Injunction ("PI Order") (Doc. 131) and is derived from the parties' expert declarations and expert reports. At birth, infants are generally assigned a sex based on their external genitalia, internal reproductive organs, and chromosomal makeup. "Sex" is a distinct biological classification that is encoded in every person's DNA and makes us male or female. "Gender" is the social and cultural concept referring to the roles, behaviors, and identities that society assigns to girls and boys, women and men, and gender-diverse people. "Gender identity" refers to a person's subjective feelings about their core sense of belonging to a particular gender. As SB 99 recognizes, "[a]n individual's gender may or may not align with the individual's sex." Mont. Code Ann. § 50-4-1003(2). The term "cisgender" refers to a person whose gender identity matches their sex assigned at birth. The term "transgender" refers to a person whose gender identity is not congruent with their sex assigned at birth. This incongruence can lead to clinically significant distress, a diagnosable condition termed "gender dysphoria."

Gender Dysphoria & Treatment

SB 99 defines gender dysphoria as "the condition defined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition" ("DSM-5"). Mont. Code Ann. § 50-4-1003(3). The DSM-5 gives the following criteria for gender dysphoria:

> A marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as manifested by at least two of the following:
>
> A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)[;]
>
> B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)[;]
>
> C. A strong desire for the primary and/or secondary sex characteristics of the other gender[;]
>
> D. A strong desire to be of the other gender (or some alternative gender different from one's desired gender)[;]
>
> E. A strong desire to be treated as the other gender (or some alternative gender different from one's designated gender[;]
>
> F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's desired gender)[.]

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision*, at 512–513 (5th, ed. 2022). Thus, it is undisputed that gender dysphoria is a recognized, diagnosable condition, which reflects the consensus among experts in the field of psychiatry.

Additionally, it is undisputed that clinical practice guidelines exist for the treatment of gender dysphoria. These guidelines were established by the World Professional Association for Transgender Health ("WPATH") and the Endocrine Society (hereinafter the "Guidelines"); the Guidelines include the provision of puberty blockers and hormone therapy, treatments that are collectively referred to as gender-affirming medical care. Pls.' App., at A.058–59, A.201–02 (Doc. 187). It is further undisputed that the Guidelines are endorsed by the major medical organizations in the United States, including the American Medical Association ("AMA"), the American Psychiatric Association ("APA"), the American Psychological Association, and the American Academy of Pediatrics, among others. *Id.*, at A.059, A.426, A.468–69 (Docs. 187, 188) (Olson-Kennedy, M.D., M.S., Expert Rep.; AMA letter opposing SB 99). The Guidelines are also endorsed by professional medical organizations in Montana. The Montana chapters of both the AMA and the American Academy of Pediatrics filed an amicus brief in the Montana Supreme Court, alongside national medical organizations. *Id.*, at A.470 (Doc. 188) (letter opposing SB 99 from Montana medical organizations). All of these organizations take the position that gender-affirming medical care should remain a treatment option available to minors with gender dysphoria when appropriate.

Under the Guidelines, whether such care is appropriate depends on an individualized, case-by-case determination made by the minor's medical providers

in consultation with the minor and their parents. Such care is only recommended as a treatment option for adolescents—persons who have started puberty. *Id.*, at A.060, A.203, A.341 (Docs. 187, 188) (Hodax, M.D., Decl.; Olson-Kennedy, M.D., M.S., Expert Rep.; Van Meter, M.D., Expert Rep.). The Guidelines do not recommend any medical intervention for prepubertal children with gender dysphoria. The Guidelines specifically recommend all of the following requirements be met prior to recommending gender-affirming medical care:

> 6.12- We recommend health care professionals assessing transgender and gender diverse adolescents only recommend gender-affirming medical or surgical treatments requested by the patient when:
>
> 6.12.a- the adolescent meets the diagnostic criteria of gender incongruence as per the ICd-11 in situations where a diagnosis is necessary to access health care . . . .
>
> 6.12.b- the experience of gender diversity/incongruence is marked and sustained over time.
>
> 6.12.c- the adolescent demonstrates the emotional and cognitive maturity required to provide informed consent/assent for the treatment.
>
> 6.12.d- the adolescent's mental health concerns (if any) that may interfere with diagnostic clarity, capacity to consent, and gender-affirming medical treatments have been addressed.
>
> 6.12.e- the adolescent has been informed of the reproductive effects, including the potential loss of fertility and the available options to preserve fertility, and these have been discussed in the context of the adolescent's stage of pubertal development.
>
> 6.12.f- the adolescent has reached [T]anner [S]tage 2 of puberty for pubertal suppression to be initiated.

> 6.12.g- the adolescent had at least 12 months of gender- affirming hormone therapy or longer, if required, to achieve the desired surgical result for gender-affirming procedures, including breast augmentation, orchiectomy, vaginoplasty, hysterectomy, phalloplasty, metoidioplasty, and facial surgery as part of gender-affirming treatment unless hormone therapy is either not desired or is medically contraindicated.

Pls.' Supp. App., at SA.063 (Doc. 204) (Nangia, M.D., Expert Rep.) (quoting the Guidelines).

The Guidelines also recommend that a comprehensive psychological assessment be performed by a qualified provider who has training and experience treating adolescents with gender dysphoria prior to initiating any gender-affirming medical care. Pls.' App., at A.202 (Doc. 187) (Moyer, Ph.D., Expert Rep.) (noting a provider also assesses a family's capacity to make informed decisions as well as any additional mental health concerns and makes a plan to address such concerns when needed under the Guidelines). As with all medical treatments for minors, the Guidelines provide for informed consent from parents or legal guardians prior to initiating any gender-affirming medical care and also specify information that should be provided about the potential risks and benefits of treatment. *Id.*, at A.284–288 (Doc. 187) (Moyer, Ph.D., Expert Rebuttal Rep.). Finally, although surgeries are a recognized form of gender-affirming medical care under the Guidelines, the record demonstrates that such surgeries are rarely recommended in Montana. *See, e.g.*, Pls.' App., at A.071 (Doc. 187) (Olson-Kennedy, M.D., M.S., Expert Rep.) ("For youth

with gender dysphoria under the age of 18, surgery is rare . . . . [and] requires informed consent from the parent(s) or legal guardians of the youth, as well as assent from the youth."). Provider Plaintiffs aver that they apply the Guidelines in their practices in Montana. Pls.' App., at A.026, A.033 (Doc. 187) (Mistretta, D.N.P., A.P.R.N., F.N.P.-B.C., Decl.; Hodax, M.D., Decl.).

Other Medical Care for Minors & Senate Bill 422

It cannot be disputed that risk is an inevitable component of medical care and that many—if not all—medical treatments carry some risk that patients, their families, and their doctors weigh against potential benefits. *Id.*, at A.162 (Doc. 187) (Olson-Kennedy, M.D., M.S.) (explaining "[e]very single medication has potential negative side effects . . . ."). Likewise, it cannot be disputed that all potential risks associated with gender-affirming medical care as identified by Defendants—including cardiovascular concerns, infertility, and regret—are posed by other treatments that doctors may provide to minors free from legislative interference. *Id.*, at A.075–76, A. 348 (Docs. 187, 188) (Hodax, M.D., Decl.; Van Meter, M.D., Expert Rep.). Further, it is undisputed that it is commonplace for treatments used across the medical profession to have evidentiary bases that are categorized as "very low quality" according to healthcare grading criteria. *Id.*, A.354, 368–72, A.374 (Doc. 188) (Curlin, M.D., Dep.; Nangia, M.D., Dep.).

It is also undisputed that Montana does not ban other medical treatments based on potential risks or inadequate evidence of efficacy. To the contrary, in the 68th Legislative Session—the same session in which SB 99 was passed—the Montana Legislature enacted Senate Bill 422 ("SB 422"), a "right-to-try" law that guarantees the rights of adults and minors to use even investigational drugs that have not been approved by the U.S. Food and Drug Administration ("FDA") for any indication. *See* SB 422, 2023 Leg., 68th Sess. (Mont. 2023) (codified as Mont. Code Ann. §§ 50-12-102 to 110). Under SB 422, a drug need only have had a "Phase I" clinical trial, which merely assesses toxicity, not efficacy. Pls.' App., at A.355 (Doc. 188) (Curlin, M.D., Dep.). It is undisputed that puberty blockers, estrogen, and testosterone, medications used in gender-affirming medical care, have been approved by the FDA for other indications. *Id.*, at A.336–37 (Doc. 188). It is further undisputed that a drug may be prescribed "off label" for any other purpose once approved by the FDA, and that "off-label" use is common among doctors, and especially common in pediatrics. *Id.*, at A.265–66, A.351, A.379, A.385–86, A.401 (Docs. 187, 188) (Moyer, Ph.D., Expert Rebuttal Rep.; Curlin, M.D., Dep.; Nangia, M.D., Dep.; Roman, M.D., Dep.).

The Parties

Plaintiff Phoebe Cross is a transgender minor who currently receives gender-affirming medical care that is banned by SB 99. Plaintiffs also include Phoebe's

parents, Molly and Paul Cross, and John and Jane Doe ("Parent Plaintiffs"), parents of non-party Joanne Doe, a transgender minor who also receives gender-affirming medical care that is banned by SB 99. The remaining Plaintiffs, Dr. Juanita Hodax, a pediatric endocrinologist, and Dr. Katherine Mistretta, a Board-Certified Family Nurse Practitioner, Advanced Practiced Registered Nurse, and Doctor of Nursing ("Provider Plaintiffs"), provide the medical care that SB 99 bans.[1] Defendants include, among others, the State of Montana; Gregory Gianforte, in his official capacity as Governor of the State of Montana; and Austin Knudsen, in his official capacity as Attorney General for the State of Montana.

Procedural Posture

Plaintiffs filed this action on May 9, 2023 seeking declaratory judgment and injunctive relief; the Complaint was amended on July 17, 2023. Therein, Plaintiffs allege that SB 99 is unlawful and unconstitutional on its face, and they bring the following claims for relief: (I) Equal Protection of the Laws (all Plaintiffs against all Defendants); (II) Interference with Fundamental Parental Rights (Parent Plaintiffs against all Defendants); (III) Right to Privacy (all Plaintiffs against all Defendants); (IV) Right to Seek Health (all Plaintiffs against all Defendants); (V) Right to Dignity (all Plaintiffs against all Defendants); and (VI) Freedom of Speech and Expression (all Plaintiffs against all Defendants). Am. Compl., ¶¶ 166–237 (Doc. 60).

[1] Plaintiffs Scarlett Van Garderen and her parents were voluntarily dismissed from the case after Scarlett turned 18.

On July 17, 2023, Plaintiffs filed a *Motion for Preliminary Injunction* to enjoin Defendants, their agents, their employees, their representatives, and their successors from enforcing SB 99 after its effective date of October 1, 2023. On September 27, 2023, this Court granted the motion, holding that Plaintiffs met Montana's four-part, conjunctive preliminary injunction test, including specific findings that Plaintiffs were likely to succeed on the merits of their right to privacy claim and their equal protection claim. Defendants appealed the PI Order to the Montana Supreme Court, and this Court's ruling was affirmed on December 11, 2024. *Cross et al. v. State et al.*, 2024 MT 303, 419 Mont. 290, 560 P.3d 637.

On January 15, 2025, the parties filed cross-motions for summary judgment. Plaintiffs argue that summary judgment in their favor is warranted and SB 99 should be permanently enjoined because, in the 16 months since the PI Order was issued, Defendants have failed to proffer evidence sufficient to clearly and convincingly demonstrate a medically acknowledged, bona fide health risk exists. Additionally, Plaintiffs argue that SB 99 cannot withstand strict scrutiny review primarily because it is not a narrowly tailored law. Defendants argue that summary judgment should be granted in their favor because the State has a compelling interest in protecting minors and their families and because SB 99 enhances minors' protections, making it constitutional under Article II, § 15, and a permissible exercise of the State's police power. Alternatively, they argue that SB 99 survives under any level of scrutiny.

The Court also ordered simultaneous supplemental briefing on Count VI (Freedom of Speech & Expression). The Court granted leave for the State to file a response brief to address Plaintiffs' arguments. The Court heard oral argument on April 24, 2025.

LEGAL STANDARD

Rule 56 of the Montana Rules of Civil Procedure governs summary judgment motions. A summary judgment analysis requires that judgment "be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." M. R. Civ. P. 56(c)(3).

Summary judgment is a burden-shifting standard. "The party moving for summary judgment has the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200. If the moving party meets this burden, then the "burden . . . shifts to the nonmoving party to establish that a genuine issue of material fact does exist." *Id.* (citation omitted). The party opposing a motion for summary judgment has an obligation to respond with specific facts showing that a genuine issue for a factfinder exists and "[u]nsupported conclusory or speculative statements do not raise a genuine issue of material fact." *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 31, 290 Mont. 126, 962

P.2d 1205; M. R. Civ. P. 56(e). Because summary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a controversy exists over a material fact, "the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences therefrom will be drawn in favor of the party opposing summary judgment." *Nelson v. Nelson*, 2005 MT 263, ¶ 15, 329 Mont. 85, 122 P.3d 1196.

ANALYSIS

"The constitutionality of a legislative enactment is prima facie presumed . . . ." *Powder River County v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. "Every possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.*, ¶ 74 (citing *Davis v. Union Pacific R. Co.*, 282 Mont. 233, 240, 937 P.2d 27, 31). "The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." *Id.* (citing *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703).

I. Right to Privacy (Count III)

Montana's right to privacy guarantees that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. "The right to privacy is fundamental; its protection 'exceed[s] even that provided by the federal

constitution.'" *Cross et al.*, ¶ 22 (quoting *Armstrong v. State*, 1999 MT 261, ¶¶ 34–35, 296 Mont. 361, 989 P.2d 364) (citations omitted). "That the right to privacy is separately protected in the Montana Constitution 'reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.'" *Id.* (quoting *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997)); *accord Weems v. State*, 2023 MT 82, ¶ 35, 412 Mont. 132, 529 P.3d 798 (quoting Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1681) (noting Delegate Campbell proclaimed that the "right to be let alone" is "the most important right of them all."). "The right of privacy should also . . . protect citizens . . . from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 33.

Specifically, in Montana, "the right to privacy 'broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from governmental interference.'" *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301 (quoting *Armstrong*, ¶ 14) [hereinafter *Planned Parenthood I*].

"Where the legislation at issue infringes upon a fundamental right . . . strict scrutiny [is applied] . . . ." *Weems*, ¶ 34.[2] Because the right to privacy is fundamental,

[2] "In order to be fundamental, a right must be found within Montana's Declaration of Rights or be a right 'without which other constitutionally guaranteed rights would have little meaning.'" *Butte*

"legislation infringing the exercise of the right of privacy must be reviewed under a strict scrutiny analysis . . . ." *Armstrong*, ¶ 34. Notably, the Montana Supreme Court held that SB 99 needed to satisfy strict scrutiny in affirming the PI Order. *Cross et al.*, ¶ 37. However, with the right to privacy in the medical context, there is a threshold question that must be addressed before engaging in a strict scrutiny analysis. Specifically, whether the legislation addresses a real and medically acknowledged health risk.

> [E]xcept in the face of a medically[] acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, must less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so.

Armstrong, ¶ 62 (alteration in original).

Plaintiffs claim that SB 99, on its face and as applied, violates transgender minors' right to privacy by limiting their ability to make medical decisions in concert with their parents and medical providers. Plaintiffs also claim SB 99 violates the privacy rights of transgender minors' parents and of medical providers because it intrudes upon the private relationship between a minor patient, their guardians, and

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Cmty. Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (quoting *In the Matter of C.H.*, 210 Mont. 184, 201, 683 P.2d 931, 940 (1984)). Montana's right to privacy is located in the Declaration of Rights. *See* Mont. Const. art. II, § 10.

their health care provider by restricting providers' ability recommend certain treatments. Am. Compl., ¶¶ 194–200 (Doc. 60).

On summary judgment, Plaintiffs argue that the State failed to demonstrate that the medical community has acknowledged that the treatments at issue pose a health risk warranting their prohibition, and that accepting the State's arguments as true, at best they demonstrate differing opinions within the medical profession regarding the care prohibited by SB 99. Plaintiffs also argue that SB 99 cannot survive strict scrutiny because Defendants have not demonstrated a compelling state interest, nor is SB 99 a narrowly tailored law.

Defendants, rather than engaging in an analysis squarely under the standard delineated in *Armstrong*, argue that no medical consensus exists on the *benefits* of gender-affirming care. Additionally, Defendants do not accept that strict scrutiny is the correct standard. They instead argue that SB 99 satisfies a constitutional exception under Article II, Section 15. Specifically, they claim that a compelling state interest exists—protecting minors from pressure to receive "experimental" treatments—and SB 99 enhances the protection of minors by banning such treatments. Finally, Defendants argue that even in the absence of Article II, Section 15, the State's police power permissibly limits the right to privacy here, and that SB 99 can withstand any level of scrutiny.

A. Medically Acknowledged, Bona Fide Health Risk

The requirement that the State clearly and convincingly demonstrate a medically acknowledged, bona fide health *risk* is a threshold consideration that applies before SB 99 can be subjected to strict scrutiny. *See Cross et al.*, ¶ 28 (citing *Armstrong*, ¶ 62). Importantly, the "legal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities." *Armstrong*, ¶ 62.

In assessing whether a medical consensus or acknowledgment of risk by the medical community exists, the Montana Supreme Court typically looks to the positions adopted by major medical organizations in the United States. *See, e.g.*, *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶ 38, 417 Mont. 457, 554 P.3d 153 ("The [AMA] and the American Academy of Pediatrics, and other medical organizations, are opposed to parental consent laws.") [hereinafter *Planned Parenthood II*]. Here, Plaintiffs have provided undisputed evidence that major medical organizations acknowledge the gender-affirming medical care banned by SB 99 is generally appropriate for treating adolescents with gender dysphoria:

> The WPATH [Guidelines] have been endorsed and cited as authoritative by the major medical associations in the United States, including the [AMA], the American Academy of Pediatrics, the [APA], the American Psychological Association, the Endocrine Society, the

> Pediatric Endocrine Society, the American College of Physicians, and the American Academy of Family Physicians, among others.

Pls.' App., at A.059, ¶ 34 (Doc. 187) (Olson-Kennedy, M.D., M.S., Expert Rep.). The Montana Supreme Court recognized this in addressing the PI Order. *Cross et al.*, ¶ 35 ("leading United States medical organizations, including the [AMA], the [APA], and the American Academy of Pediatrics, endorse and cite the WPATH [Guidelines] as authoritative for treating gender dysphoria.").

Defendants are unable to clearly and convincingly establish that a bona fide health risk exists. They have not put forth any evidence showing major medical organizations in the United States have changed their stance on gender-affirming medical care. Instead, they argue that no medical consensus exists on the *benefits* of gender-affirming care. This is the incorrect standard. The question is whether a medically acknowledged, bona fide health *risk* exists. Based on the position of the United States' major medical organizations and their endorsement of the Guidelines for treating adolescents with gender dysphoria, there is no genuine dispute that it does not. Defendants also argue that "[a] court is poorly positioned . . . to determine what is a medically acknowledged, bona fide health risk[,]" and "[s]uch a determination must be made by the medical community." Defs.' Br. in Supp. MSJ, at 35 (Doc. 190). The Court concurs that reliance on the United States' major medical organizations is proper when engaging in an analysis under the *Armstrong* standard.

The evidence Defendants submitted and and rely on is insufficient because it does not amount to a medically acknowledged, bona fide health risk as required under *Armstrong*. Regardless, the Court will address some of that evidence.

Some Risk Does Not Equal Bona Fide Risk

Defendants argue, and Plaintiffs do not dispute, that there are *some* risks associated with gender-affirming medical care. However, to be sure, "some risk" and a "medically acknowledged, bona fide health risk" are two distinct measures. Risk is an inherent factor in the field of medicine. Pls.' App., at A.162 (Doc. 187) (Olson-Kennedy, M.D., M.S., Expert Rebuttal Rep.) (explaining "[e]very single medication has potential negative side effects . . . ."). Thus, acknowledgment of some risk cannot amount to a medically acknowledged, bona fide health risk, otherwise all medical treatments would satisfy the *Armstrong* standard and be subject to State interference.

Off-Label Use Does of Equal Bona Fide Risk

Defendants' argument that the FDA does not approve puberty blockers for treatment of gender dysphoria, which constitutes a medical consensus on risk, is simply incorrect. The record demonstrates that off-label use of FDA-approved drugs or treatments is common—particularly in pediatrics—and not directly correlated to lack of evidence, safety, or efficacy. *See, e.g.*, Pls.' App., at A.076 (Doc. 187) (Olson-Kennedy, M.D., M.S., Expert Rep.) (citing U.S. Food and Drug Admin.

Understanding Unapproved Use of Approved Drugs "Off Label" (Feb. 5, 2018), https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatmentoptions/understanding-unapproved-use-approved-drugs-label)) ("From the FDA perspective, once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient . . . ."); Pls.' App., at A.265–66, A.351, A.379, A.385–86, A.401 (Docs. 187, 188) (Antommaria, M.D., Ph.D., F.A.A.P., H.E.C.-C., Expert Rebuttal Rep.; Curlin, M.D., Dep.; Roman, M.D., Dep.; Van Meter, M.D., Dep.). In fact, Defendants' experts testified that they prescribe medications off-label in their own practices, and that they see no issue with doing so in other medical contexts. *Id.*, at A.351, A.379, A.401, A.425 (Doc. 188) (Expert Rebuttal Rep.; Curlin, M.D., Dep.; Roman, M.D., Dep.; Van Meter, M.D., Dep.). This argument is especially unpersuasive in light of SB 422, which prohibits governmental interference with access to medications and products that have not been approved by the FDA for any use.

Foreign Practices and Research

Defendants rely on foreign practices regarding gender-affirming medical care, including European research like the Cass Report, to "prov[e] the risk" of gender-affirming medical care. Defs.' Br. in Supp. MSJ, at 25 (Doc. 190). They argue that Finland, Sweden, England, Scotland, Wales, Denmark, and Norway have either

banned such care or severely restricted access it. Defs.' Br. in Resp., at 4 (Doc. 205).[3] Again, evidence of some risk does not satisfy the *Armstrong* standard. Moreover, to the degree foreign countries are departing from the Guidelines in treating gender dysphoria, it is of no consequence here. The major medical organizations in the United States continue to endorse the Guidelines; accordingly, the Court will not rely on foreign practices to find that a medically acknowledged, bona fide health risk exists under *Armstrong*.

Defendants' Experts

Defendants' expert witnesses opine that gender-affirming medical care can present a bona fide health risk. However, it cannot be disputed that these experts, on their own, do not create medical acknowledgement under *Armstrong*. These experts' opinions are not representative of the opinion of the medical community writ large, at least in the United States; rather, these experts disagree with the medical consensus. The fact that some medical professionals disagree with the medical consensus does "not clearly and convincingly demonstrate that the proscribed treatments present a bona fide health risk to minors." *Cross et al.*, ¶ 21. If some disagreement among medical professionals were enough to create a medically

[3] None of the countries Defendants list have enacted a categorical ban on gender-affirming medical care comparable to SB 99. As clarified during oral argument, even the most restrictive European countries allow such care for minors who are 16 years old or older.

acknowledged, bona fide health risk, every medical treatment would satisfy the *Armstrong* standard and be subject to State interference.

Possibility of Regret

Finally, Defendants rely heavily on persons they call "detransitioners," individuals who chose to receive gender-affirming medical care and regret that decision. *See, e.g.*, Defs.' Br. in Supp. MSJ, Ex. C, D (Doc. 190) (Hein Decl.; Palmer Decl.). Defendants' take the position that the existence of "detransitioners" establishes a medically acknowledged, bona fide health risk. Experts proffered by both sides acknowledge that research shows the rate of regret with respect to gender-affirming medical care is relatively low. Pls.' App., at A.244–46, A.205, A.384, A.408–10 (Docs. 187, 188) (Moyer, Ph.D., Expert Rebuttal Rep.; Moyer, Ph.D., Expert Rep.; Nangia, M.D., Dep; Roman, M.D., Dep.). However, one of Defendants' experts avers that the rate of regret is estimated to be 30%. Defs.' Br. in Resp. Ex. H, ¶ 4 (Doc. 205) (Van Meter, M.D., Supp. Decl.). Even taking that percentage as true—a statistic that Plaintiffs dispute as unsourced and overinflated—"[t]here is no space in medicine where [medical professionals] would prioritize a false positive by discontinuing care for all of the true positives." Pls. App., at A.118 (Doc. 187) (Olson-Kennedy, M.D., M.S., Expert Rebuttal Rep.). In other words, it is illogical for the Montana Legislature to pass laws regulating medical treatment that would hurt a majority where it might help the minority. *See infra*, at 31–32, discussing the

overbreadth of SB 99 under a strict scrutiny analysis. As the United States Supreme Court has recognized, "the government does not have a legitimate interest in protecting against the 'fear that people [will] make bad decisions if given truthful information.'" *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022) (alteration in original) (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

Regardless, the fact that a minority of individuals express regret following gender-affirming medical care does not establish a medically acknowledged, bona fide health risk. Otherwise, most every medical treatment would satisfy the *Armstrong* standard and be subject to State interference. For example, studies have found that prostatectomy in some instance carries a 30% regret rate. *See* Pls.' Reply Br., at n.10 (Doc. 233) (citing Jamie Lindsay et al., *Patient Satisfaction and Regret After Robot-assisted Radical Prostatectomy: A Decision Regret Analysis*, 149 J. Urology 122 (Mar. 2020) (study finding that prostatectomy in some instances carries a 30% regret rate).

Informed Consent

Furthermore, the practice of medicine contemplates informed consent to address inherent risks and allow patients to make informed decisions in concert with their doctors and, in the case of minors, in concert with their parents or guardians. The Court disregards any post-hoc justification that minors cannot consent to

gender-affirming medical care. In passing SB 422, the Montana Legislature was perfectly clear that minors may give informed consent to experimental treatments with unknown side effects and unknown efficacy. To take a different position with regard to gender-affirming medical care only underlines that the issue here is ideological rather than medical. Finally, even assuming Defendants are correct that minors are incapable of providing informed consent with respect to gender affirming medical care, they would still fail to establish a medically acknowledged, bona fide health *risk*. An inability to consent and a bona fide health risk under *Armstrong* are not one in the same.

Summary of Defendants' Other Arguments

In summary, nothing put forth by the Defendants establishes a medically acknowledged, bona fide health risk under *Armstrong*. There is certainly risk inherent in all medical treatments, including gender-affirming care, but that is exactly why "some risk" is not the standard. If it were, all medical treatments would be subject to State interference.

B. Strict Scrutiny

SB 99 does not clear the preliminary threshold of establishing that the gender-affirming medical care it prohibits presents a medically acknowledged, bona fide health risk. However, even if SB 99 cleared the *Armstrong* threshold, the statute is still constitutionally infirm because it cannot survive strict scrutiny review. Strict

scrutiny requires that the State demonstrate the challenged law is narrowly tailored to serve a compelling government interest "and only that interest," *Stand Up Mont. v. Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 10, 409 Mont. 330, 514 P.3d 1062, or is "tailored narrowly so that it is 'the least onerous path that can be taken to achieve the state objective.'" *Cross et al.*, ¶ 28 (quoting *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996)).

Compelling Government Interest

The stated purpose of SB 99 is "to enhance the protection of minors and their families . . . from any form of *pressure* to receive harmful, experimental puberty blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority." Mont. Code Ann. § 50-4-1002 (emphasis added).[4] However, Defendants have put forth no evidence that any minors in Montana—or their families—have been "pressured" into receiving gender-affirming medical care. In fact, none of Defendants' expert witnesses have any knowledge of the practices of any Montana medical providers who provide gender-affirming care, let alone knowledge of any exertion of pressure by these providers.

[4] Defendants also generally reference protecting minors' health and safety and the protection of the physical and psychological well-being of minors. As Plaintiffs point out, Defendants should be limited to argument regarding the compelling interest asserted at the time of enactment. *See Native Am. Council of Tribes v. Weber*, 897 F. Supp. 2d 828, 849 (D.S.D. 2012), *aff'd*, 750 F.3d 742 (8th Cir. 2014) ("Because post-hoc rationalizations provide an insufficient basis to find a compelling governmental interest, the court must look to the compelling interest asserted by defendants at the time of the ban."); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the stated interest is clearly protection from pressure by medical providers.

See Pls.' App., at A.349, A.360, A.392–93, A.400, A.462–63 (Doc. 188) (Curlin, M.D., Dep.; Nangia, M.D., Dep.; Reed Dep.; Roman, M.D., Dep.; Ortley Dep.).

Additionally, none of the "detransitioners" or parents of transgender people Defendants declare were pressured to receive gender-affirming medical care in Montana. *See* Defs.' Resp. in Opp. to Pls.' Mot. for Prelim. Inj. Ex. BB (Doc. 105) (Kiefel Decl.); *Id.* Ex. CC (Doc. 106) (Sheinfeld Decl.); *Id.* Ex. DD (Doc. 107) (Crowley (pseudonym) Decl.); *Id.* Ex. EE (Doc. 108) (Dixon Decl.); Defs. Br. in Supp. MSJ Ex. C (Doc. 190) (Hein Decl.).[5] The lone Montanan Defendants rely on, Elle Palmer, expresses regret, but does not aver she was pressured into receiving gender-affirming medical care. *Id.* Ex. D (Doc. 190) (Palmer Decl.).

Further, while Defendants say that the January 27, 2025 Senate Judiciary Committee hearing on SB 99 "overflows" with testimony describing the pressure minors and their families face to undergo gender-affirming medical care, they provide no evidence of this in the record for the Court to examine. The Court takes judicial notice of the testimony Defendants submitted from the first Senate Judiciary Committee Hearing on SB 99. Defs.' Br. in Supp. MSJ, at 5 (Doc. 190) (providing the following link to the hearing video: https://tinyurl.com/33nr5fs5). However, that testimony centered around regret of transitioning; it did not provide evidence of

[5] The Court notes that Aether Dixon specifically received treatment in Oklahoma and Luka Hein is located in Nebraska.

pressure from medical providers to receive gender-affirming medical care in Montana.

Defendants also assert that medical malpractice claims against medical professionals who "pressed" gender-affirming care are on the rise. Though Defendants cite several complaints, none have been fully adjudicated such that they could serve to demonstrate pressure on summary judgment. Moreover, the case that has been submitted to the Court as evidence does not involve minors in Montana, nor medical practices in Montana. Defs.' Br. in Supp. MSJ Ex. H (Doc. 190) (*Breen v. Olson-Kennedy, M.D., et al.*, Case No. 24STCV32096, Superior Court of the State of California, Los Angeles County). Also, importantly, rather than addressing any of the risks Defendants' experts identify or the State's fears regarding efficacy, SB 99 is clear in its purpose: ensuring minors in Montana are never provided treatment to address their "perception that [their] gender or sex" is something other than their sex assigned at birth. Mont. Code Ann. § 50-4-1004(1)(a)–(c).

"Necessarily, demonstrating a compelling interest entails something more than simply saying it is so[,]" and "[s]imply because the State alleges a compelling interest, does not obviate the necessity that the State prove the compelling interest by competent evidence." *Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174. Here, Defendants have not met their burden of proving by competent evidence that minors in Montana, or their families, are being pressured to receive gender-affirming care

by medical providers. Instead, Defendants have simply stated pressure exists. "[S]peculation is insufficient to satisfy strict scrutiny." *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021). Therefore, Defendants have not demonstrated a compelling government interest, and SB 99 cannot survive strict scrutiny.

Narrowly Tailored

Assuming *arguendo* Defendants proved a compelling state interest, SB 99 still cannot withstand strict scrutiny because it is not a narrowly tailored law. "A statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *Planned Parenthood II*, ¶ 32. SB 99 is both underinclusive and overinclusive. It is underinclusive because the undisputed facts show that similar concerns exist with other medications provided to minors that are not banned by SB 99. Again, all medications carry some degree of risk. Similarly, the State is concerned with minors' ability to provide informed consent with respect to gender-affirming medical care, but minors are permitted to provide informed consent to all other treatments and surgeries—including experimental ones with no proof of efficacy and with unknown side effects under SB 422—that could result in lifelong changes or serious bodily harm.

SB 99 is also fatally overinclusive because none of the State's purported interests (*e.g.*, protecting minors from pressure from medical professionals;

protecting minors from risks, including evidence quality and off-label use; protecting minors from possible misdiagnosis or regret) explains why gender-affirming medical care for adolescents is banned in *all* cases. As the Montana Supreme Court recognized, "SB 99 affords no room for decision-making by a patient in consultation with their doctors and parents. *The statute is a complete ban*, prohibiting individualized care tailored to the needs of each patient based on the exercise of professional medical judgment and informed consent." *Cross et al.*, ¶ 37 (emphasis added).

Defendants argue that SB 99 can withstand any level of scrutiny, including strict scrutiny, because "[p]rohibiting puberty blockers, cross-sex hormones, and surgery for minors was the most narrowly tailored pathway to achieve Montana's interest in enhancing minors' protections against the harms these treatments present . . . ." Defs.' Br. in Supp. MSJ, at 26 (Doc. 190). However, a categorial ban is the antithesis of a narrowly tailored law. It is undisputed that existing state mechanisms that regulate the practice of medicine can be used to address the State's codified concern, pressure to receive gender-affirming medical care in Montana, through investigation and discipline by licensing bodies, medical malpractice claims, and informed consent actions. Pls.' App., at A.455–56 (Doc. 188) (Defendants' Rule 30(b)(6) designee testifying that a healthcare professional pressuring a patient could constitute unprofessional conduct that licensing bodies could investigate).

SB 99 also prohibits state property, facilities, and buildings from "knowingly [being] used to promote or advocate the use of social transitioning." Mont. Code Ann. § 50-4-1004(7). SB 99 defines "social transitioning" to mean:

> acts *other than pharmaceutical or surgical interventions* that are offered as treatment to a minor for the purpose of the minor presenting as the opposite sex or an identity other than the minor's sex, including the changing of a minor's preferred pronouns or dress and the recommendation to wear clothing or devices, such as binders, for the purpose of concealing a minor's secondary sex characteristics.

Mont. Code Ann. § 50-4-1003(10) (emphasis added). This provision—and the fact that SB 422 was passed in the same session—demonstrates that the State is not seriously concerned with pressure, nor is it concerned with enhancing safety for minors. Instead, the Court is forced to conclude that the State's interest is actually a political and ideological one: ensuring minors in Montana are never provided treatment to address their "perception that [their] gender or sex" is something other than their sex assigned at birth. Mont. Code Ann. § 50-4-1004(1)(a)–(c).[6] In other words, the State's interest is actually blocking transgender expression. Importantly, the "legal standards for medical practice and procedure cannot be based on political ideology . . . ." *Armstrong*, ¶ 62. Therefore, SB 99 is not narrowly tailored to any of

[6] The Court notes that the legislative record is replete with animus toward transgender persons, mischaracterizations of the care proscribed by SB 99, and statements from individual legislators suggesting personal, moral, or religious disapproval of gender transition. *See* Am. Compl., ¶¶ 69, 70 (Doc. 60) (Senator Manzella stating "you cannot change your sex" because "the Creator has reserved that for Himself[,]" and Senator Fuller, sponsor of SB 99, objecting to providing transgender people with gender-affirming hormones because he believed it was not "natural.").

the State's codified interest, nor any of its other purported interests, and it cannot survive strict scrutiny review.

Article II, Section 15

Defendants argue that Article II, Section 15 of the Montana Constitution creates a textual exception to minors' exercise of fundamental rights where the Montana Legislature clearly shows "(1) a compelling state interest, and (2) that the provisions enhance minors' protections." Defs. Br. in Supp., at 13 (Doc. 190). Importantly, according to Defendants, under Article II, Section 15, minors' fundamental rights could be infringed even where a law was not narrowly tailored to achieve a compelling state interest. Defendants' attempt to evade the full weight of strict scrutiny is unsuccessful.

"The rights of persons under 18 years of age shall include, but not be limited to all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Mont. Const. art. II, § 15. The comments to the Bill of Rights Committee provide that the crux of the proposal was: "To recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults. In such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced." *In re C.H.*, 210 Mont. 184,

at 202–03, 683 P.2d 931, at 940 (quoting Committee Report, Vol. II, 634–36 (1971–72)).

The Montana Supreme Court has held that "minors . . . enjoy all the fundamental rights of an adult under Article II." *In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (1997); *see also In re J.W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 498 P.3d 211 (stating "Montana youths are constitutionally guaranteed the same fundamental rights as adults."). Recently, the Montana Supreme Court clarified that:

> minors do not have *more* or *enhanced rights* in comparison to adults; rather Article II, Section 15 provides that minors have the *same* fundamental rights as adults under Article II, which may be infringed only when the State can clearly show a compelling state interest 'which enhance[s] the *protection* of such persons.'

Planned Parenthood II, ¶ 21 (quoting Mont. Const. art. II, § 15) (emphasis in original). In other words, minors have the same fundamental right to privacy as adults, and the only exception is in cases where minors' rights are infringed by laws "designed and operating to enhance the protection" of minors. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940 (quoting Committee Report, Vol. II, 634–36 (1971–72)).

In *Planned Parenthood II*, after clarifying the bounds of minors' privacy rights, the Montana Supreme Court proceeded to engage in a strict scrutiny analysis under the mandates of Article II, Section 15. It stated:

> Applying strict scrutiny requires that the burden shift to the State to demonstrate, first, that the legislation is justified by a compelling state interest. Second, the State must demonstrate that the legislation is narrowly tailored to effectuate only that compelling interest. Finally,

> the State must make a 'clear showing that [a minor's] protection is being enhanced.'

Planned Parenthood II, ¶ 25 (alteration in original) (quoting *In re C.H.*, 210 Mont. at 203, 683 P.2d at 940). Thus, Defendants' articulation of a different standard under Article II, Section 15 is incorrect and impermissibly lowers their burden because it does not include narrow tailoring.

Regardless, SB 99 cannot even satisfy Defendants' proffered Article II, Section 15 standard because nothing in the record supports a finding that SB 99 enhances minors' protections. If the Court were to find Defendants' evidence here supported a finding that SB 99 enhances the protection of minors, it would lead to absurd results. For example, Defendants argue that SB 99 protects minors because:

> [I]t provides [them] with the opportunity to reach their full potential without being denied freedoms or autonomy later in life because of their rash decisions as children. It prevents susceptible youth and their families from medical providers' pressure to receive experimental treatments and procedures which will all but certainly change their physiology and natural bodily functions. Sterility, bone fragility, inability to achieve orgasm, and a host of other harms can befall minors before they ever reach their full potentials. Taking away procreative autonomy before reaching majority, for example, is unacceptable. SB 99 protects minors from this dim future.

Defs. Br. in Supp. MSJ, at 20–21 (Doc. 190). Defendants primarily rely on declarations from "detransitioners" for this argument. Again, even taking Defendants' figures as true, 30% of persons regret receiving gender-affirming medical care. Thus, under Defendants' reasoning, the State could infringe on minors' fundamental rights whenever any minor was protected at the expense of the majority

of minors. For example, the State could categorically ban all influenza vaccines for all minors in an effort to protect the small percentage of minors who experience allergic reactions to that vaccine. This line of reasoning would lead to absurd results.

C. Right to Privacy Summary

The Montana Legislature has no legitimate interest to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure except in the face of a medically acknowledged, bona fide health risk, clearly and convincingly demonstrated. *Armstrong*, ¶ 62.

Plaintiffs put forward undisputed evidence showing that the major medical organizations in the United States support gender-affirming medical care as an effective, safe treatment for adolescents with gender dysphoria, and they showed they are entitled to judgment as a matter of law on this claim. Defendants were unable to meet their burden of establishing that a genuine issue of material fact exists. In fact, taking all Defendants' witnesses' testimony as true, they still fail to clearly and convincingly demonstrate a medically acknowledged, bona fide health risk given the medical consensus in the United States. Accordingly, Defendants failed to clear the threshold *Armstrong* standard.

Even assuming *arguendo* that Defendants satisfied that standard, they failed to meet their burden to demonstrate that SB 99 is justified by a compelling state interest and is narrowly tailored to effectuate that interest. Therefore, SB 99

impermissibly puts governmental regulation in the mix of minors' fundamental right to "make medical judgments affecting her or his bodily integrity and health in partnership with a chosen healthcare provider[,]" and the Court finds that SB 99 impermissibly infringes on the Plaintiffs' constitutional right to privacy on summary judgment. *Armstrong*, ¶ 39,

II. Equal Protection of the Laws (Count I)

Plaintiffs claim that SB 99, on its face and as applied, denies patients equal protection of the laws on the basis of gender identity, sex, and transgender status. Specifically, Plaintiffs claim that SB 99 targets transgender minors because health care providers are prohibited from administering certain medically necessary care when that care is sought to treat gender dysphoria, when those providers may administer that care to their cisgender adolescent patients. Am. Compl., ¶¶ 166–180 (Doc. 60).

The Montana Constitution commands that:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art. II, § 4. This is a fundamental right, and "[t]he principal purpose of the Equal Protection Clause is 'to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action.'" *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065 (quoting *Mont. Cannabis Indus. Ass'n v.*

State, 2016 MT 44, ¶ 15, 382 Mont. 356, 368 P.3d 1131). "Article II, Section 4 of the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445 (citing *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987)).

Montana courts evaluate potential equal protection violations using a three-step process: "First, the Court identifies the classes involved and determines if they are similarly situated. Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. Third, the Court applies the appropriate level of scrutiny to the statute." *Hensley*, ¶ 18 (citing *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶¶ 15, 17, 18, 353 Mont. 265, 222 P.3d 566).

A. Similarly Situated Classes

Plaintiffs have demonstrated that the classes at issue here are similarly situated. The Court identifies similarly situated classes "by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley*, ¶ 19 (citing *Snetsinger*, ¶ 27). SB 99 bars the provision of certain medical treatments and surgeries only when provided "to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male." Mont. Code Ann. §

50-4-1004(1)(c). Because "transgender" refers to a person whose gender identity is not congruent with their sex assigned at birth, SB 99 classifies based directly on transgender status. Accordingly, the classes at issue are (1) transgender minors in Montana, and (2) all other minors in Montana. If the language classifying minors based on their gender perception is removed, the two groups are identical in all other respects: they are Montanans under the age of 18.

B. Appropriate Level of Scrutiny

The appropriate level of scrutiny to apply to SB 99 is strict scrutiny for three distinct reasons. First, "[w]here the legislation at issue infringes upon a fundamental right . . . strict scrutiny [is applied] . . . ." *Weems*, ¶ 34; *Planned Parenthood II*, ¶¶ 16, 25, 29. SB 99 infringes on three fundamental rights. Plaintiffs have successfully demonstrated that SB 99 infringes on the right to privacy. *See supra*, at 16–38; *Cross et al.*, ¶ 39 ("Given its preliminary determination that the Plaintiffs were likely to prevail on their claimed privacy infringement, the District Court correctly applied strict scrutiny to the entire measure."). Additionally, Plaintiffs have successfully demonstrated that SB 99 infringes on the right of individual dignity, specifically Montana's equal protection clause, because it prohibits transgender minors in Montana from seeking certain medical treatments and surgeries that are available to all other minors in Montana. *See infra*, at 39–42. Finally, Plaintiffs have successfully

demonstrated that SB 99 infringes on the right of freedom of speech and expression because it prohibits speech based on the message conveyed. *See infra*, at 42–52.

Second, "'[a]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *see also Hecox v. Little*, 104 F.4th 1061, 1074 (9th Cir. 2024) (holding heightened scrutiny applied to a law that classified on the basis of sex and on the basis of transgender status). The United States Supreme Court has held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty.*, 590 U.S. 644, 660 (2020). The *Bostock* Court provided a useful example:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id.; *accord, e.g.*, *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, at 670 (8th Cir. 2022) (finding under a substantially similar law that "[b]ecause the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the [challenged] law, [it] discriminates on the basis of sex."). Because SB 99 discriminates on the basis of transgender status, a minor's sex plays an

"unmistakable and impermissible role" in the determination of who may receive the treatments and surgeries it proscribes. Thus, SB 99 makes sex-based classifications.[7]

As this Court pointed out in its PI Order, the Montana Supreme Court has not yet explicitly identified the level of scrutiny applicable to sex-based classifications.[8] Regardless, strict scrutiny is the appropriate standard where a sex-based classification exists. Federal courts and the United States Supreme Court have applied "heightened scrutiny"[9] when an equal protection claim involves gender-based or sex-based discrimination. *See Virginia*, 518 U.S. at 555; *J.E.B.*, 511 U.S. at 135 ("Since [1971], this Court consistently has subjected gender-based classifications to heightened scrutiny . . . ."); *Bostock*, 590 U.S. at 733 (citing *Sessions v. Morales-Santana*, 582 U.S. 47, 57–58 (2017)) (Alito, J. & Thomas, J., dissenting) (stating "the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened standard of review is met."). Thus, this Court concludes that strict scrutiny is the appropriate level of review because heightened scrutiny is employed in other jurisdictions where sex-based classifications exist, and Montana's equal protection clause "'provides for even more individual protection' than does the federal equal protection clause . . . ." *Snetsinger*, ¶ 58 (quoting *Cottrill*, 229 Mont.

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[7] On appeal, Justice McKinnon concurred that "discrimination based on sex as explicitly contained in [Montana's Equal Protection Clause] includes discrimination on the basis of transgender status." *Cross et al.*, ¶ 63 (McKinnon, J., concurring).

[8] Non-binding Montana precedent suggests that "[l]aws based on gender orientation are palpably sex-based and are, therefore, suspect classifications . . . ." and that unequal treatment based on gender is sex-based and inherently suspect. *Snetsinger*, ¶¶ 83, 87 (Nelson, J., concurring).

[9] *See* PI Order, at 26–27 (discussing and comparing heightened scrutiny versus strict scrutiny).

at 42, 744 P.2d at 897) (Nelson, J., concurring)). Moreover, Article II, Section 4 of the Montana Constitution is unequivocal in its intolerance for discrimination, which overtly includes discrimination on the basis of sex. *Cross et al.*, ¶ 64 (McKinnon, J., concurring).

Third, "where the legislation at issue . . . discriminates against a suspect class . . . strict scrutiny [is applied] . . . ." *Powell*, 2000 MT 321, ¶ 17, 302 Mont. 518, 15 P.3d 877. SB 99 discriminates against a suspect class: transgender status. A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); *In re S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371 (1997). Transgender persons constitute a suspect class. *Cross et al.*, ¶ 65 (McKinnon, J., concurring) ("this Court should separately and additionally hold that transgender status is a suspect class."). It is indisputable that transgender persons meet the suspect class criteria—arguably more today than at any other point in history, as evidenced by the rise in anti-trans legislation in Montana and across the country.[10] The Ninth Circuit has come to the same conclusion where the federal equal protection clause is implicated. *Norsworthy*

[10] The Court takes judicial notice of all cases cited by the parties in this matter related to other states enacting laws similar to SB 99. The Court also takes judicial notice of the number of proposed bills that would negatively impact transgender persons introduced in the last two legislative sessions in Montana.

v. Beard, 87 F. Supp. 3d 1104, 1119 (9th Cir. 2015) (stating that "discrimination based on transgender status independently qualifies as a suspect classification under the [federal] Equal Protection Clause because transgender persons meet the indicia of a 'suspect' or 'quasi-suspect classification' identified by the Supreme Court [of the United States].").

In sum, strict scrutiny is the appropriate level of scrutiny to apply to SB 99 for three distinct reasons. First, SB 99 infringes on at least three fundamental rights. Second, SB 99 makes a sex-based classification, and "Article II, Section 4 is unequivocal in its intolerance for discrimination, which [explicitly] includes discrimination based on sex." *Cross et al.*, ¶ 64 (McKinnon, J., concurring). Third, SB 99 discriminates against transgender status, a suspect class.

C. Applying Strict Scrutiny

In its analysis of Plaintiffs' right to privacy claim, the Court concluded that SB 99 could not survive strict scrutiny review. Having concluded that strict scrutiny applies here, that analysis and conclusion is incorporated with respect to Plaintiffs' equal protection claim. Plaintiffs met their burden to establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law on this claim. Defendants were unable to meet their burden of establishing that a genuine issue of material fact exists. Therefore, the Court finds that SB 99 impermissibly

infringes on the Plaintiffs' constitutional rights to equal protection of the laws on summary judgment.

III. Freedom of Speech & Expression (Count VI)

Plaintiffs allege that that SB 99 impermissibly burdens the right to freedom of speech and expression for medical professionals who would promote various practices prohibited by SB 99 like Provider Plaintiffs, who have a right to speak about medically accepted treatments they believe are in their patients' best interest, along with the rights of Montanan minors and their parents or legal guardians to receive such information. Am. Compl., ¶¶ 231–32 (Doc. 60).

In Montana, "[n]o laws shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mont. Const. art. II, § 7. "The right to free speech is a fundamental personal right and 'essential to the common quest for truth and the vitality of society as a whole.'" *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 (quoting *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 26, 341 Mont. 368, 178 P.3d 696). "The 'vast majority' of speech enjoys constitutional protection." *Dugan*, ¶ 18 (quoting *State v. Lance*, 222 Mont. 92, 102, 721 P.2d 1258, 1265 (1986)). However, "neither the First Amendment nor Article II, Section 7, provide unlimited protection for all forms of speech." *Id.* (citing *St. James Healthcare*, ¶ 29). "'It is axiomatic that the government may not regulate

speech based on its substantive content or the message it conveys.'" *Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, 198 P.3d 284 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995)).

In their Supplemental Brief, Plaintiffs argue that SB 99 violates Montana's protections on freedom of speech and expression because it is a content-based regulation that impermissibly prohibits speech based on the content and viewpoint of the speech. Specifically, Plaintiffs argue that SB 99 bars providers from engaging in speech to make out-of-state referrals as well as promoting or advocating gender-affirming medical care, which restricts speech solely based on whether it supports treatment of gender dysphoria through gender-affirming medical care and affirms transgender identity. Plaintiffs also argue that because SB 99 is neither viewpoint nor content neutral, it triggers strict scrutiny under Article II, Section 7.

Defendants argue that Plaintiffs abandoned this claim because it was only discussed it in a footnote in summary judgment briefing. Alternatively, Defendants argue SB 99 does not impermissibly regulate speech but rather regulates professional conduct. Specifically, as to Provider Plaintiffs, Defendants argue that the Montana Legislature may prohibit using state funds to promote or advocate for the prohibited medical treatments, and doing so does not violate free speech. As to Minor Plaintiffs, Defendants again argue that the Montana Legislature is empowered to curtail certain rights under Article II, Section 15 if doing so enhances the protection of minors; they

further argue that SB 99 enhances the protection of minors because it prevents taxpayer funded health care providers from advocating or promoting dangerous and prohibited medical procedures.[11] Finally, Defendants argue that, for those reasons, SB 99 triggers and satisfies rational basis review.

A. Abandonment

Plaintiffs' freedom of speech and expression claim was technically raised—albeit briefly—on summary judgment. In their Brief in Support, Plaintiffs stated:

> Following the Court's preliminary injunction order and the Montana Supreme Court's opinion affirming it, Plaintiffs focus on their right-to-privacy and equal-protection claims. But Plaintiffs note that strict scrutiny applies equally to their other constitutional claims as well, including claims based on . . . the right to free speech and expression, *see State v. Lamoureux*, 2021 MT 94, ¶ 21, 404 Mont. 61, 485 P.3d 192 (content-based restrictions on speech are 'presumptively invalid' and can be upheld only if 'narrowly tailored to control conduct without a substantial amount of protected speech' . . . .").

Pls.' Br. in Supp. MSJ, at 9–10, n.5 (Doc. 186). As Defendants point out, a footnote is the wrong place for substantive arguments on the merits of a motion. However, Plaintiffs made no substantive argument in the footnote. Instead, elsewhere in the body of their Brief in Support, Plaintiffs argued that strict scrutiny was the correct standard of review, that strict scrutiny applied to all their claims—including Count VI—and that SB 99 could not withstand strict scrutiny review. Plaintiffs also

[11] The Court will not readdress this issue and instead relies on its previous analysis of Defendants' arguments under Article II, Section 15 and conclusion that their asserted standard is incorrect. *See supra*, at 32.

addressed this claim in their Reply Brief and their Brief in Response to Defendants' Motion for Summary Judgment. Moreover, Plaintiffs did not move for partial summary judgment, meaning all six of their claims, including their freedom of speech and expression claim, were subsumed in their motion. Although Plaintiffs' freedom of speech and expression claim was raised, it was not fully fleshed out. For that reason, the Court ordered simultaneous supplemental briefing.[12]

B. Viewpoint Discrimination

"A law regulating expressive content is 'presumptively invalid.'" *State v. Lamoureux*, 2021 MT 94, ¶ 21, 404 Mont. 61, 485 P.3d 192 (quoting *United States v. Stevens*, 559 U.S. 460, 469 (2010)). "A regulation is content-based if the law 'on its face, draws distinctions based on the message a speaker conveys,' such as 'the topic discussed or the idea or message expressed.'" *Lamoureux*, ¶ 21 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015). "[V]iewpoint discrimination is 'an egregious form of content discrimination,' and the government 'must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'" *Denke*, ¶ 47 (quoting *Rosenberger*, 515 U.S. at 829).

[12] On April 15, 2025, Defendants filed a Notice of Objection to Plaintiffs' Supplemental Briefing on Count VI Freedom of Speech and Expression. Therein, they object to Plaintiffs' argument that SB 99 § 4(7), codified as Mont. Code Ann. § 50-4-1004(7), violates the Montana Constitution, because that argument was raised for the first time in their supplemental brief. The Court agrees that this specific argument is untimely, especially considering Plaintiffs' Count VI refers to § 4(4), not § 4(7). *See* Am. Compl., ¶ 231 (Doc. 60).

SB 99 provides that "[a]ny individual or entity that receives state funds to pay for or subsidize the treatment of minors for psychological conditions, including gender dysphoria, may not use state funds to promote or advocate the medical treatments prohibited in subsection (1)(a) or (1)(b)." Mont. Code Ann. 50-4-1004(4). The Court must determine if this is a permissible regulation of conduct or an unconstitutional regulation of content.

As Plaintiffs point out, *Rust v. Sullivan* provides a useful comparison. The federal government provides funding for family planning through the Title X program. 500 U.S. 173, 177 (1991). The Department of Health and Human Services issued regulations limiting the ability of Title X fund recipients to engage in abortion-related activities. *Id.* (quoting 42 U.S.C. § 300a-6) ("none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."). "That restriction was intended to ensure that Title X funds would 'be used only to support preventative family planning services, population research, infertility services, and other related medical, informational, and educational activities.'" *Id.*, 500 U.S. at 178–79 (quoting H. R. Conf. Rep. No. 91-1667, p. 8 (1970)).

Petitioners contended that the regulations violated the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the

provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." *Id.*, 500 U.S. at 192. In other words, petitioners asserted that because "Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." *Id.*

The United States Supreme Court disagreed and held that the government was exercising its lawful authority "to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion.'" *Id.*, 500 U.S. at 193. It stated that:

> the government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. The *Rust* Court went on to clarify that "'a basic difference [exists] between direct state interference with protected activity and state encouragement of an alternative activity consonant with legislative policy.'" *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1997)).

Importantly, in holding that the government did not unconstitutionally discriminate on the basis of viewpoint, the *Rust* Court relied heavily on the fact that the Title X program was designed "not for prenatal care, but to encourage family

planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is *outside the scope* of the federally funded program." *Id.* (emphasis added). The regulation at issue in *Rust* was "a prohibition on a project grantee or its employees from engaging in activities *outside the project's scope*." *Id.* (emphasis added). The program did not provide any "post conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option . . . ." *Id.*, 500 U.S. at 200.

Here, SB 99 regulates "individual[s] or entit[ies] that receive[] state funds to pay for or subsidize the treatment of minors for psychological conditions." Mont. Code Ann. § 50-4-1004(4). Crucially, this includes Medicaid and Healthy Montana Kids ("HMK"), two programs that provide comprehensive health coverage. *See* Mont. Code Ann. § 53-4-1104(1). Accordingly, under SB 99, when a transgender minor covered by HMK visits their primary care provider—who is responsible for a wide range of that child's health needs—that provider is barred from any speech that could be viewed as "promoting" or "advocating" gender-affirming medical care. Thus, unlike *Rust*, SB 99 prohibits providers from engaging in certain activities and speech that are inside the scope of coverage. Additionally, unlike *Rust*, given the comprehensive scope of the programs affected by SB 99, silence with regard to

gender-affirming medical care can reasonably be thought to mislead a minor client and their parents into thinking that the provider does not consider such care to be an appropriate option. This reality is driven home by the fact that the same provider could "promote" or "advocate" these treatments to any cisgender Montanan minor covered by HMK. Therefore, the Court must find that SB 99 is a content-based regulation and invidiously discriminates on the basis of viewpoint.

That SB 99 constitutes viewpoint discrimination is further supported by the fact that it bars medical providers from making referrals, even to out-of-state providers. For example, under SB 99, a provider seeing a transgender patient covered by HMK is barred not only from providing gender-affirming medical care, but also from referring that patient to any other medical professional who could provide that care. This goes beyond any permissible regulation of conduct. It unconstitutionally bars providers from telling minors and their parents that gender-affirming medical care, which is endorsed and cited as authoritative by major medical associations in the United States for treating gender dysphoria, is an option. It even bars these providers from telling transgender minors and their parents that gender-affirming medical care is available outside of Montana. As Defendants' Rule 30(b)(6) designee made clear, "[i]t wouldn't matter where that care was obtained, inside or outside" the State, so "the State would . . . have an interest in prohibiting that." Pls.' Supp. App., at SA.034 (Doc. 204) (Ortley Dep.).

This matter is more analogous to *Brandt v. Rutledge*, where a federal district court enjoined an Arkansas law, HB 1570, that "prohibits a physician or other healthcare provider from providing or referring any individual under the age of 18 for gender transition procedures." 551 F. Supp. 3d at 887, *aff'd*, 47 F.4th 661 (8th Cir. 2022) (internal quotations omitted). There, like here, the State argued that HB 1570 was not a regulation of speech, but rather a permissible regulation of professional conduct within the medical field. *Id.*, at 893. The district court disagreed, noting that the plain text of the law regulated speech based on its content because it prohibited healthcare professionals from making referrals only for "gender transition procedures." *Id.* Here, like *Brandt*, SB 99 is a content-based regulation because it prevents healthcare providers from administering medical treatments, or promoting or advocating for the same, only in the context of "address[ing] the minor's perceptions [his/her] gender [does not align with his/her sex]." Mont. Code Ann. 50-4-1004(1)(a)–(c). For all the foregoing reasons, SB 99 unconstitutionally regulates medical providers' speech based on content and viewpoint and is therefore presumptively invalid. *Lamoureux*, ¶ 21.

C. Right to Receive Information

SB 99 also infringes on transgender minors' right and their parents' right to receive information. Montana's constitutional right to freedom of speech and expression includes the right to receive information as an indispensable component

of the free exchange of ideas. *See State ex rel. Missoulian v. Mont. Twenty-First Jud. Dist. Ct.*, 281 Mont. 285, 301, 933 P.2d 829, 839 (1997). "Recognition of the recipient's rights is particularly compelling in Montana where there exists, in addition to the right to free speech found in the First Amendment to the United States Constitution and in Article II, Section 7 of the Montana Constitution, the 'Right to Know' provision of Article II, Section 9 of the Montana Constitution." *Id.*, 281 Mont. at 302, 933 P.2d at 839.

SB 99 departs from Montana's general attempts to facilitate, not restrict, speech in the medical context. For example, SB 422 prohibits officials from taking action against "a health care provider based solely on the health care provider's recommendations to a patient regarding access to or treatment with an investigational drug, biological product, or device." Mont. Code Ann. § 50-12-108(1). Similarly, Montana also allows healthcare providers to "make a patient aware of or educate or advise a patient about lawful health care services for which a reasonable basis exists, including the off-label use of health care services." Mont. Code Ann. § 37-2-503(1)(a). These laws demonstrate the State's own recognition of the importance of allowing the free flow of information between providers and patients—unless that information addresses treatment for gender dysphoria.

D. Strict Scrutiny

The freedom of speech and expression guaranteed by Article II, Section 7 is a fundamental right in Montana. Plaintiffs have met their burden to establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law on this claim by showing that SB 99 infringes on the right of freedom of speech and expression because the restriction on speech is content-based and constitutes viewpoint discrimination. Accordingly, again, SB 99 is subject to strict scrutiny. In its analysis of Plaintiffs' right to privacy claim, the Court concluded that SB 99 could not survive strict scrutiny review. That analysis and conclusion is incorporated here with respect to Plaintiffs' freedom of speech and expression claim. Defendants are unable to meet their burden of establishing that a genuine issue of material fact exists. Therefore, the Court finds that SB 99 impermissibly infringes on the Plaintiffs' constitutional rights to freedom of speech and expression on summary judgment.

IV. Plaintiffs' Remaining Claims

While the parties disagree on a myriad of topics, there is an absence of genuine issues of material fact, and Plaintiffs have demonstrated that they are entitled to judgment as a matter of law on Counts I, III, and VI. Accordingly, SB 99 is unconstitutional because it violates several of Plaintiffs' fundamental rights,

necessitating a permanent injunction. Therefore, Plaintiffs' remaining claims are moot.

CONCLUSION

First, concerning right to privacy, Plaintiffs have met their burden to establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law on this claim by providing evidence that the major medical organizations in the United States endorse gender-affirming medical care as a safe, effective way to treat gender dysphoria. Defendants are unable to meet their burden of establishing that a genuine issue of material fact exists because they fail to demonstrate a medically acknowledged, bona fide health risk with respect to the care banned by SB 99. Although Defendants demonstrate that some degree of risk and regret are associated with gender-affirming medical care, such a showing is immaterial as it does not satisfy the *Armstrong* standard. Additionally, Defendants fail to demonstrate that SB 99, which imposes a categorical ban, is narrowly tailored to achieve a compelling government interest. Therefore, Plaintiffs are entitled to judgment as a matter of law on this claim.

Second, Plaintiffs have met their burden to establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law on their equal protection claim by demonstrating that SB 99 classifies based on similarly situated classes, infringes on several fundamental rights, and denies minors

equal protection of the laws on the basis of sex and transgender status because it prohibits health care providers from administering certain care when sought to treat adolescents with gender dysphoria, but it allows the same providers to administer the same care to all other adolescent patients for all other purposes. Defendants are unable to meet their burden of establishing that a genuine issue of material fact exists, and they again fail to demonstrate that SB 99 is narrowly tailored to achieve a compelling government interest. Therefore, Plaintiffs are entitled to judgment as a matter of law on this claim.

Finally, concerning Plaintiffs' freedom of speech and expression claim, Plaintiffs have met their burden to establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law by demonstrating that SB 99 prohibits health care providers from administering medical care, or promoting or advocating for the same, only in the context of "address[ing] the minor's perceptions [his/her] gender [does not align with his/her sex]." Mont. Code Ann. 50-4-1004(1)(a)–(c). Accordingly, Plaintiffs successfully demonstrate that SB 99 unconstitutionally regulates medical providers' speech based on content and viewpoint discrimination, and that it is presumptively invalid. *Lamoureux*, ¶ 21. Moreover, Plaintiffs successfully demonstrate that SB 99 prohibits minors with gender dysphoria and their parents from hearing from health care providers about medical care that is endorsed by the leading medical associations in the United States

as an appropriate way to treat gender dysphoria. Defendants are unable to meet their burden of establishing that a genuine issue of material fact exists, and they again fail to demonstrate that SB 99 is narrowly tailored to achieve a compelling government interest. Therefore, Plaintiffs are entitled to judgment as a matter of law on this claim.

In sum, there is no genuine dispute of material fact as to the above three claims, and Plaintiffs have demonstrated that they are entitled to judgment as a matter of law as to each. Therefore, the Court hereby GRANTS Plaintiffs' *Motion for Summary Judgment* on Counts I, III, and VI and DENIES Defendants' *Motion for Summary Judgment* on Counts I, III, and VI. Accordingly, having found SB 99 unconstitutional, the Court hereby PERMANENTLY ENJOINS SB 99 and declines to address Plaintiffs' remaining claims. The final pre-trial conference and the pending trial in this matter are hereby ORDERED vacated.

DATED this 13th day of May, 2025.

Hon. Jason Marks
District Court Judge

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